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2 UNITED STATES BANKRUPTCY COURT  
3 SOUTHERN DISTRICT OF NEW YORK  
4 Case No. 12-12020-mg

## 6 || In the Matter of:

**8 RESIDENTIAL CAPITAL, LLC, et al.,**

## **10 | Debtors.**

18 | October 7, 2014

19 | Page

21 | BEFORE

22 | HON. MARTIN GLENN

23 U.S. BANKRUPTCY JUDGE

1  
2 Telephone Conference, on the Record, Regarding Discovery  
3 Dispute in Reference to the Mack's Claims  
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1 P R O C E E D I N G S

2 THE COURT: All right. We're on the record in  
3 Residential Capital, number 12-12020. This is a telephone  
4 conference in connection with a discovery dispute concerning  
5 the Mack claim.

6 May I have the appearances, please?

7 MR. LEWIS: Yes, Your Honor. Adam Lewis of Morrison &  
8 Foerster for the ResCap Borrower Claims Trust.

9 THE COURT: Good afternoon.

10 MR. GARBER: Your Honor, David Garber on behalf of Mr.  
11 Mack and Mrs. Mack's estate.

12 THE COURT: All right. Thank you very much.

13 Mr. Lewis, why don't you go ahead and start?

14 You had forwarded some correspondence, and I read it  
15 over quickly, but why don't you tell me where things stand as  
16 of now?

17 MR. LEWIS: Yes. I'll be happy to try to explain the  
18 situation. In the course of doing that, Your Honor, I'm going  
19 to characterize Mr. Garber's position as I understand it, but I  
20 may misstate it, and, of course, he'll have a chance to correct  
21 anything I say.

22 The Court will recall the remaining claim in this  
23 matter is the RESPA claim for the alleged failure of GMACM to  
24 respond to a qualified written request and any damages arising  
25 from that failure to respond.

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1           When the Court ruled that that was still part of their  
2 case the Court expressly stated that the claimant would have to  
3 show what damages arose specifically from the failure to  
4 respond, as contrasted with other things that may or may not  
5 have been done, including the wrongful foreclosure.

6           The failure to respond -- the response would have been  
7 due, I think, on December 26th of 2009. The letter was sent in  
8 October, but in those days it was a sixty-day response cycle.  
9 So what I was -- my discovery is aimed, in part, at trying to  
10 separate out in the world the Mack's conditions prior to late  
11 December from those after late December, because anything  
12 before late December would already have been compensated by the  
13 prior judgment. And then for after late December I would have  
14 to -- in that pool of information that I would get I would then  
15 have to try to extract what might be traceable to the RESPA  
16 violation and what might not be.

17           Mr. Garber, in my view, will have to try to do the  
18 same when he puts on his case, but I don't want to wait for him  
19 to do that.

20           And so my discovery was aimed at tracking primarily  
21 their medical conditions from 2000 through, pretty much,  
22 through today in order to create those two pools of  
23 information, the pre-late December, 2009 and the post, and then  
24 try, in the post, to reduce it to what might be specifically  
25 traceable to the RESPA issue. And so I served, as the Court

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1 could see in Mr. Garber's discovery responses, document  
2 requests that were aimed, in part, at that issue.

3 My belief is that under the Federal Rules, which apply  
4 here, a party has possession, custody, and, more specifically  
5 control over his medical records. And as I indicated in one of  
6 the letters, in both New Jersey and Florida a party has a right  
7 to his medical records. He may have to wait a while. He may  
8 have to pay some money for copying costs. But he has a right  
9 to them, a statutory right. So it's my belief that it's the  
10 responsibility of the Mack claimant to produce those medical  
11 records that I've asked for.

12 My impression is that Mr. Garber thinks he has to only  
13 go so far, and then if it's too much trouble shift the burden  
14 to me, and also shift the burden to me of telling him which  
15 records I want from amongst his various providers that he sent  
16 me a list of. But I have no way of knowing which providers I  
17 want material from or further information from until I see what  
18 they did or didn't do.

19 I have no information, of course, on what the Macks or  
20 either of them consulted them for at any point in time. Only  
21 the Macks have that information. So I can't tell Mr. Garber,  
22 on the list of providers that he sent me, which ones I want  
23 documents from. I want documents for the period from all of  
24 them, so that I can decide what it is that I need to go forward  
25 on.

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1           That's basically, I think, what this is about. And we  
2 don't have a lot of time to complete our discovery, and so I  
3 felt it important to get this issue teed up sooner rather than  
4 later to try to get it resolved, so that we all know what we're  
5 doing going forward.

6           THE COURT: Mr. Garber?

7           MR. GARBER: Your Honor, this was a matter briefly in  
8 which my client sent out a qualified written request on October  
9 26, 2009. And the Court has ruled that generally speaking  
10 those records, medical records and damages before that date,  
11 may not be compensable damages. But after that date any  
12 records and damages may be compensable.

13           Mr. Lewis has asked for all of my client's medical  
14 records for the period of time from the 1st of January, 2000  
15 until the 1st of November, 2009, and then also from the 1st of  
16 November, 2009 to the present. My clients, Mr. Mack and Mrs.  
17 Mack, they're elderly, and they have -- Ms. Mack is dead, but  
18 Mr. Mack has sent me a copy of his billing history that he has  
19 kept going back to the 1st of January, 2009. It identifies  
20 about sixty different medical care providers: doctors,  
21 hospitals, radiologists, that sort of thing. And we have  
22 attempted to get those medical records. We don't have the  
23 medical records. They all are in the hands of the medical care  
24 providers.

25           We have received back responses from, perhaps, 8

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1 medical care providers and have incurred costs of about 3,000  
2 dollars. And we have sent all the records that we have  
3 received to Mr. Lewis. We are still awaiting other records.  
4 But I anticipate that some of the medical care providers,  
5 specifically a hospital in Northern Florida called the Mayo  
6 Clinic, will have records that are very, very extensive. I  
7 wouldn't be surprised if they were 20 to 50,000 pages long.  
8 And the hospital in the State of Florida can charge a dollar a  
9 page for each one of those things.

10 We have asked for all of those medical records. And  
11 everything that we get we're going to send to Mr. Lewis,  
12 whether they're relevant or not relevant. They may have  
13 something to do with impeachment, even if they're not directly  
14 related to the damages that my clients can claim.

15 But it seems to me that I cannot force the doctors and  
16 the hospital to send me things, and if the expense is much more  
17 than we paid already, 3,000 dollars, that, in fact, the rule  
18 that the Court announced in a nonpublished case, which I've  
19 referred to Mr. Lewis. It's the Fisher v. Fisher case from the  
20 Western District of Maryland from June 5th of 2012. The Court  
21 was faced with a similar thing where a defendant -- she was the  
22 counterclaimant -- was claiming damages from an institution  
23 that had published some of her records and not worked with her  
24 on a debt. And so she was asked to provide tens of thousands  
25 of pages, and the Court, in that opinion, said that if they

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1 were her medical records, and if she could get those medical  
2 records, it was her duty to do so, even if they weren't  
3 actually in her possession. But it said, and I will read a  
4 quote from the case:

5 "If the related documents are not in defendant's  
6 actual possession or custody but in the physical custody of a  
7 non-party financial institution, and may be obtained at no  
8 greater cost by either plaintiff or defendant, defendant will  
9 not be compelled to produce them."

10 That seems to me to be a fair rationale here. We have  
11 paid already, or have incurred debts of about 3,000 dollars.  
12 But if we find that we're going to have 10 or 30,000 dollars,  
13 or have some difficulty that the hospitals won't give them to  
14 us, it seems to me that GMAC would have as equal a chance of  
15 getting these documents from a subpoena as we would.

16 In any case, we will try our best to get them all and  
17 provide them as they come in to Mr. Lewis.

18 THE COURT: All right. My silence is because I'm  
19 looking for something on my computer, so just bear with me.

20 MR. GARBER: Your Honor, if you're looking up a cite  
21 on that Fisher case I don't have a cite, but I have the civil  
22 case number if the Court would want that.

23 THE COURT: No, I'm not. I'm looking up one of my own  
24 opinions.

25 MR. GARBER: Okay.

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1 (Pause)

2 THE COURT: So I read an opinion in a case, in re  
3 Lozano, L-O-Z-A-N-O. I can't give -- it's a published opinion.  
4 I can't give you the Bankruptcy Reporter cite. It was released  
5 on August 13, 2008, so it's quite some time ago.

6 It was in a Chapter 13 case. But the issue that I  
7 dealt with there was I ruled on a discovery dispute between the  
8 Chapter 13 debtor and the mortgage servicers. And the issue  
9 was whether the mortgage servicers had to affirmatively obtain  
10 copies of documents from the original lender. And I  
11 specifically analyzed Rule 34, and basically you're required to  
12 produce anything in the possession, custody, or control. And I  
13 have a fairly lengthy discussion about what control means and  
14 what cases say about it. I didn't think about the decision  
15 before I got on the call here, but it --

16 Mr. Garber, you've put Ms. Mack's medical condition at  
17 issue with your claims. And I think that that places a greater  
18 burden on you to obtain documents that -- not only in your  
19 possession or custody but also in control. And I think that's  
20 the issue raised with respect to the medical records.

21 Let me shift gears for a minute. We'll come back to  
22 that. What I want to briefly discuss with you both is the  
23 issue of the period for which records should be provided.

24 So when I thought about this, Mr. Lewis and Mr.  
25 Garber, in some ways this strikes me as the law school -- first

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1 year law school torts Palsgraf, the eggshell head case. And so  
2 whether -- I don't know whether Ms. Mack had, for want of a  
3 better term, emotional issues for which she was treated before  
4 this foreclosure proceeding began.

5 So whether it require -- I'm not prepared to say  
6 whether it requires going all the way back to 2000, but I can  
7 certainly see and appreciate, it seems to me, that Mr. Lewis is  
8 entitled to medical information about Ms. Mack for a period  
9 well before the events that give rise to the claim.

10 I don't know, for example, whether she'd been treated  
11 for alcohol or medication abuse for earlier periods, whether  
12 she'd been in counseling or seen by health care professionals  
13 that specialize in mental illness or emotional issues.

14 Can you address that for me, Mr. Garber?

15 MR. GARBER: Your Honor, I believe that she had  
16 received some such care. Now, to give a little bit more  
17 background to the Court, in 2002 she had a liver transplant.  
18 The liver transplant was characterized as nonalcoholic  
19 cirrhosis of the liver that caused that she had an elevated  
20 iron count in her blood. I can see why all this information  
21 might be relevant to Mr. Lewis and his side to attack the  
22 medical damage of Ms. Mack as being pre-existing and not caused  
23 by GMAC.

24 THE COURT: Right.

25 MR. GARBER: I can understand that. That information

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1 will not be necessary by the Macks to present to the Court,  
2 because that had nothing to do with what GMAC did.

3 THE COURT: Well, you say that --

4 MR. GARBER: However --

5 THE COURT: You say that, but you've put her health  
6 and mental condition at issue in your claims. And just because  
7 you'd be very happy if Mr. Lewis didn't want to go through the  
8 trouble of getting the earlier medical records, you're the one  
9 who's -- I'm not faulting you for it -- but it's the claim and  
10 the effort to seek noneconomic damages for the really  
11 unfortunate events that occurred for Ms. Mack.

12 So that, in part, when you read Lozano you'll see, I  
13 think, arguably, that's what distinguishes -- I didn't make the  
14 existing servicer and lender go back and get the records from  
15 the original lender. I basically told the Chapter 13 debtor's  
16 lawyer you got to do it. You have their discovery means  
17 available to you. You go and do it.

18 One of the things you'll see when you read the  
19 opinion -- I focus on two opinions by then District Judge  
20 Gerard Lynch, who's now a judge on the Second Circuit, in the  
21 Winnick cases. And Judge Lynch, in his district court opinions  
22 in Winnick, deals with the issue of who has to provide the  
23 discovery, even if it means the plaintiff going to third  
24 parties to gather the information. And you'll see when you  
25 read it, in Winnick Judge Lynch put the burden on the

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1 plaintiff, or actually put the burden on the defendant to go  
2 and get it, even though the third party didn't want to give him  
3 the information. There was an issue of what the consequences  
4 of that would be. It depended, in part, on who put the matter  
5 at issue.

6 So I think that under Rule 34, which does specifically  
7 apply to possession, custody, or control and, I think, goes a  
8 long way to saying with medical records, I mean, do you satisfy  
9 the giving control by just giving a release to the medical  
10 records. Tell Mr. Lewis go. Go get what you want.

11 With that said, Mr. Lewis, I am also quite sensitive,  
12 and I am not sure that even telling -- if the result is that I  
13 tell Mr. Garber you got to go get it, that doesn't necessarily  
14 mean that I have to tell him and you pay for it, because I  
15 think that the Court has discretion to shift the costs of it.  
16 So the result, Mr. Lewis, could be that I tell Mr. Garber you  
17 go get it, but Mr. Lewis's client's got to pay for it if he  
18 wants it. So it isn't --

19 MR. LEWIS: Your Honor, again --

20 THE COURT: Go ahead, Mr. Lewis.

21 MR. LEWIS: I'm sorry.

22 THE COURT: No, go ahead.

23 MR. LEWIS: A couple of things. First of all, I think  
24 it's important to remember that we're not just talking about  
25 post-December conditions. We're talking about post-December

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1 conditions that are attributable to the RESPA violation and not  
2 simply continuations of or worsening of pre-December  
3 conditions. And so it's a much narrower band of injury that is  
4 at issue here than simply whatever happened post-December.

5 THE COURT: Well, I'm not prepared to say --

6 MR. LEWIS: That's one of the reasons --

7 THE COURT: Let me -- just let met just stop you  
8 there.

9 MR. LEWIS: Yes.

10 THE COURT: I'm certainly not prepared to rule  
11 whether -- what the effect of, for want of a better term, pre-  
12 existing conditions -- let's assume they were exacerbated by  
13 events caused by ResCap. Okay? I'm certainly not prepared to  
14 say today what the result of that would be in terms of recovery  
15 or no recovery.

16 MR. LEWIS: I understand that, Your Honor. If the  
17 RESPA violation led to a worsening of a pre-December 26th  
18 condition, that's, arguably, recoverable damages.

19 THE COURT: Right.

20 MR. LEWIS: And I understand that. But in order to be  
21 able to tease that out I have to know what pre-existed, and  
22 then try to look at what happened post-December and try to  
23 figure out which of what happened post-December is attributable  
24 to the RESPA violation.

25 THE COURT: Look, Mr. Lewis, I agree that you're

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1 entitled to the information. Okay? Who gets it and who pays  
2 for it are two different issues.

3 MR. LEWIS: And then the second thing I was going to  
4 say, Your Honor, is I'm prepared to narrow the time period at  
5 issue based upon what I've seen that Mr. Garber sent me that  
6 arrived yesterday on some CDs. Specifically, there is some  
7 hospitalization information about Ms. Mack from 2004, in which  
8 she's checked in for some dizziness that appears to be related,  
9 maybe, to a heart condition or something.

10 But in that there is a history that is given,  
11 presumably after some physician interviewing her, in which such  
12 things as renal insufficiency and aortic insufficiency and  
13 depression and alcoholism that had led her to lead to Alcohol  
14 Anonymous to join, those are all mentioned there as things that  
15 she --

16 THE COURT: Sure.

17 MR. LEWIS: -- had in her history. And so now I know  
18 I have a, kind of, a baseline. And perhaps some of these other  
19 documents from that period of time on will help me to further  
20 elaborate that baseline.

21 So I'm prepared to cut it off at the moment at 2004  
22 instead of going all the way back to 2000, now that I have some  
23 of this stuff in my hands, to try to lighten the burden. I am  
24 not doing this to bury Mr. Garber or Mr. Mack. I'm doing it  
25 because I need to defend my case.

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1 THE COURT: I don't doubt that at all. I think, based  
2 on what I know about the background and what you described to  
3 me now -- and I'm not ruling yet, Mr. Garber, so I'll hear you  
4 further -- it clearly is appropriate for Mr. Lewis to look back  
5 at Ms. Mack's medical history, medical condition, well before  
6 the events that give rise to the claim. Exactly where that  
7 cutoff should be, I mean, 2004, cutting -- if she has quite an  
8 extensive medical history cutting four years out probably  
9 accomplishes a fair amount.

10 Just let me come back again. Mr. Lewis, you're  
11 entitled to the discovery. So from my standpoint the two  
12 questions are who has to get it and who has to pay for it. And  
13 one doesn't necessarily follow from the other. Because it may  
14 be easier for Mr. Garber, even with releases and all that, it  
15 may be easier for Mr. Garber, on behalf of Mr. Mack, to get the  
16 records. And it may not break down this way on each -- I  
17 looked at this list of care providers. It's a long list.

18 What I would hope is that the two of you would  
19 cooperate, because you may be able to hash out -- look.  
20 Because where the provider is in Naples, because that's where  
21 you are, Mr. Garber, am I right in that?

22 MR. GARBER: Yes, Your Honor.

23 THE COURT: So it may be much easier for you to chase  
24 down and get the records of professionals, medical  
25 professionals who are in Naples, where you're located. And, I

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1 mean, most of them are -- there's some Miami and stuff like  
2 that, at least it's the same state as you.

3           But what I would urge is that the two of you take a  
4 crack at seeing if you can divide this list. First of all, if  
5 you can work out the dates for which the requests apply. And  
6 on that score I would tend to err with Mr. Lewis, because I  
7 think that the Trust is entitled -- Mr. Mack has put Mrs.  
8 Mack's medical condition at issue. It's clear that she had  
9 pre-existing conditions. And so it's important for Mr. Lewis  
10 to be able to gather his facts and be able to fully present it.

11           If 2004 instead of 2000, if he's satisfied with that,  
12 I'm satisfied with that. And if he comes back later and says  
13 but as to this specific -- I got these records, and I need to  
14 go back further as to this provider or that specialist, I'm  
15 certainly open to it.

16           Mr. Lewis, look, I'm sensitive about the cost to the  
17 Trust, because every dollar the Trust spends is a dollar less  
18 for borrowers for distribution. But I'm equally sensitive to  
19 the costs for Mr. Mack. I do think that I have the discretion  
20 to shift the costs so that if your -- proper though it may be,  
21 your discovery requests would require 50,000 dollars, because  
22 Florida Hospitals have a policy of a dollar a page and there's  
23 50,000 pages, I think I have the discretion to shift that cost  
24 to the Trust if you want the documents.

25           I mean, what I consider -- I mean, go read Lozano.

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1 Read the Winnick decisions that Judge Lynch -- he was dealing  
2 with all big banks. I don't think he was particularly  
3 concerned about who paid.

4 In Lozano -- well, it was a plague on all of their  
5 houses. But Lozano, I mean, I had a Chapter 13 debtor who  
6 really didn't have money, but the result was I concluded that  
7 the Lozanos' lawyer had to go and take discovery. He couldn't  
8 just simply tell the defense you go get it for me. And so  
9 that, again, comes to who's put the matter at issue.

10 Remind me what's the fact discovery cutoff date?

11 MR. LEWIS: It was four months from late August.  
12 August 25, I think, is when you entered the order.

13 THE COURT: You know, look I --

14 MR. LEWIS: And my document requests went out on the  
15 29th of August.

16 THE COURT: Yes.

17 MR. LEWIS: And the thing may -- the picture may shift  
18 once again. I also served interrogatories at that time. And  
19 they were due a couple of days ago, but Mr. Garber asked for an  
20 extension of about two weeks, and I granted it to him.

21 THE COURT: Sure.

22 MR. LEWIS: When I see those interrogatory responses,  
23 they may make my job easier and clearer, or not. But they  
24 could have a major impact on what further information I need.

25 THE COURT: Right.

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1 MR. LEWIS: I would add, too, that I don't -- I don't  
2 know how Mr. Garber intends to put on his case, and I certainly  
3 am not going to tell him how to put on his case. But it seems  
4 to me he needs the same medical information to put on his case  
5 that I need to defend my case; that is what was the situation  
6 before and how does that contrast with the situation  
7 afterwards, and what of the situation afterwards is  
8 specifically traceable to the RESPA violation? So, it seems --

9 THE COURT: Yes, I mean, look. When I --

10 MR. LEWIS: -- get the --

11 THE COURT: -- wrote the opinion, I mean, the  
12 challenge that -- one of the challenges you have, Mr. Garber,  
13 is that the worst of the facts -- the whole story is  
14 horrible -- the worst of the facts occurred before the  
15 qualified written request went out.

16 Did Stern ever go to jail?

17 MR. LEWIS: I don't know --

18 MR. GARBER: I think --

19 MR. LEWIS: -- I don't know what his situation is,  
20 Your Honor. He's not a popular man, though.

21 THE COURT: No, I know he was disbarred, but I don't  
22 know whether he ever went to jail.

23 MR. GARBER: Oh, Stern. I don't think he went to  
24 jail, but I have heard he was disbarred.

25 THE COURT: No, I knew he was disbarred.

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1 MR. LEWIS: I'm just reading a deposition from the  
2 state court case in which the Stern attorney in charge of that  
3 specific file is the witness, and it's fascinating.

4 THE COURT: I mean, look, what I --

5 MR. GARBER: I'm not hearing anything.

6 THE COURT: Mr. Garber, what -- let me ask you this.

7 You gave Mr. Lewis the list of medical professionals --

8 MR. LEWIS: Yes, Your Honor.

9 THE COURT: -- what hospitals -- what, if any, contact  
10 have you had with the names on that list to try and get  
11 records? I mean, I -- look, I think you've put Mrs. Mack's  
12 medical condition at issue. You can't carve the line by  
13 saying, well, it only is her condition from such-and-such date.  
14 I think once you put it at issue, given her pre-existing  
15 conditions, Mr. Lewis is entitled to go back in time. I do  
16 think that it's easier -- it should be easier for you to get  
17 the records than for Mr. Lewis to get the records.

18 MR. GARBER: Yes, Your Honor.

19 THE COURT: And I think that there's sufficient legal  
20 authority to say that because of this issue of control, that  
21 the records are within your control. But in saying that, I  
22 reiterate that who gets them and who pays for them are two  
23 different questions.

24 And what I -- I've never had to recover thousands of  
25 pages of my own medical records, but there were times where I

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1 had to get some of them, and most of the doctors just gave me  
2 copies and didn't raise -- it wasn't worth their time.  
3 Hospitals may be a different story, I don't know.

4 I think the way I'd like to leave things today is I  
5 want the two of you to talk again. I think for those providers  
6 who are in Naples, I am going to direct Mr. Garber to seek to  
7 get -- the two of you ought to talk about the time period  
8 again. I'm going to leave it to see if you can work that out.  
9 And then I want Mr. Garber to go to -- to move forward to get  
10 the records from the providers in Naples. You ought to see if  
11 you can work out -- because it's such a long list, Mr. Lewis,  
12 see whether, with Mr. Garber's cooperation, your office can try  
13 and get the records from some of the other providers outside of  
14 Naples.

15 You ought to find out -- both of you ought to -- I'd  
16 like to know -- and this I'm not deciding who pays, because I'd  
17 like to know how much. I'll just -- it's what I've already  
18 said, Mr. Lewis. I think that what may be the appropriate  
19 resolution here is at least a partial cost-shifting, not an  
20 entire cost-shifting. But I'm not going to rule on that in the  
21 abstract. I want to know if such-and-such hospital is saying  
22 50,000 dollars or we won't give you the records, if the two of  
23 you can't agree how to deal with it, you'll get me on the phone  
24 and I'll decide it.

25 MR. GARBER: Your Honor, you asked what we had done.

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1 We have contacted every medical care provider that we've been  
2 able to identify since the 1st of January 2000. We have asked  
3 for the medical records. We have already received about 5,000  
4 pages of medical records, all of which have been given to Mr.  
5 Lewis.

6 THE COURT: Okay.

7 MR. GARBER: So far, they sent me bills for about  
8 3,000 dollars for those records. And we are still waiting for  
9 a response from the Mayo Clinic, which will have tens of  
10 thousands of pages, I'm sure.

11 I do believe -- and I have agreed with Mr. Lewis --  
12 all of this information he can use in his defense. So I've  
13 never disputed that. It's just a matter of we have not been  
14 able to get it, at least as of the date of this telephone call.

15 THE COURT: Okay. Let me ask, was she hospitalized at  
16 Mayo Clinic in Minnesota?

17 MR. GARBER: I believe that she was. I think she had  
18 the liver transplant in 2002 in the Mayo Clinic in northern  
19 Florida.

20 MR. LEWIS: Yeah, I think Florida --

21 MR. GARBER: And then she went back periodically.

22 MR. LEWIS: Not Minnesota.

23 THE COURT: Not Minnesota?

24 MR. GARBER: Yes, there was a Mayo Clinic in northern  
25 Florida.

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1 THE COURT: Okay.

2 MR. LEWIS: And as I said, Your Honor, once I see the  
3 interrogatory responses, we may be able to whittle things down.  
4 And then I told Mr. Garber on the record today, he can skip  
5 everything before 2004, now.

6 THE COURT: Okay.

7 MR. LEWIS: Because I've got a baseline with that  
8 information. And even those from whom he's requested records,  
9 he can narrow those requests now, to anything after January 1st  
10 of 2004, and I may be able to narrow it further, as I see  
11 further materials.

12 THE COURT: Okay. Look, I --

13 MR. LEWIS: And I don't necessarily have to get each  
14 and every page from each and every provider.

15 THE COURT: Okay.

16 MR. LEWIS: As information accretes, I may be able to  
17 say to myself, I can create a record that I can rely on to  
18 accomplish what I need to accomplish without having every piece  
19 of paper that was ever generated.

20 THE COURT: Okay. Let me just talk about just how I  
21 deal with discovery cutoff dates. And I probably have --  
22 you'll forgive me if I've told you this before. But I always  
23 set discovery cutoff dates. I'm usually pretty aggressive win  
24 managing my calendar and keeping people on track.

25 My general approach about extending time is -- and I

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1 say this all the time to lawyers -- if you come and tell me you  
2 need an extension of time, you're going to have to explain to  
3 me what you've done to date. The thing I care about the most  
4 is that people have been diligent in their effort to conduct  
5 discovery. You can be diligent and because you've got all  
6 these medical providers scattered around and you're a little  
7 bit at their mercy in getting materials, if the circumstance is  
8 the discovery cutoff's approaching, we promptly requested the  
9 medical records, we've gotten X, Y, and Z, but not A, B, and C;  
10 we're still waiting on those; I'm likely to agree to extend the  
11 time. I'm not going to do that now.

12 What you need -- look, it's to everybody's advantage  
13 to get this done, because the more time you have, the work  
14 expands to fill the available time and it costs everybody time  
15 and money to do that.

16 I've said in ResCap, Mr. Garber, generally, it's my  
17 goal to get as many claims as possible resolved. There hasn't  
18 been a distribution yet. I turned down one motion to approve  
19 reserves because I wasn't satisfied with the showing that had  
20 been made. Whether your client's claim turns out to be one of  
21 these or not, I don't know. It could be one of the larger  
22 claims that is unliquidated at this stage, and it's going to  
23 have to get resolved.

24 So I'm trying to move all of the remaining ResCap  
25 matters along as fast as I possibly can. But the facts and

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1       circumstances and the issues raised by your claim are not the  
2       garden variety type; let me put it that way.

3           So what I -- I don't know whether, Mr. Lewis, this is  
4       answering your questions that you've raised in your letter and  
5       the reason you requested the conference. I do think that Mr.  
6       Garber, on most all of these provide -- and he's already said  
7       that he's taken steps to get the information from all of them.  
8       You cut back on the date a little bit, and I think that's  
9       helpful. The fact that he might have -- his client has control  
10      for purposes of Rule 34 of the Federal Rules of Civil  
11      Procedure, doesn't answer the ultimate question about the cost  
12      sharing. He's indicated he's had about 30,000 dollars in bills  
13      so far. If a provider comes along and says it's going to be  
14      50,000 dollars, because Mayo Clinic has got however-many pages,  
15      and he's going to balk at it, and you can't agree on it, you'll  
16      get me involved, because I do believe that I have the authority  
17      to shift costs, even if he has to be the one to try and get the  
18      records.

19           MR. LEWIS: Your Honor, the diligence issue -- your  
20      admonition about that, that's the reason I wanted to set this  
21      conference up instead of waiting for October 30th. I think the  
22      conference has been very helpful, actually. I really  
23      appreciate the Court's finding the time on such short notice to  
24      deal with us.

25           THE COURT: So let me just -- I'll go ahead and

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1 litigate this if I have to. Have you given up on your  
2 settlement efforts? I hope not.

3 MR. LEWIS: We're --

4 MR. GARBER: Your Honor, I don't think so. But in  
5 fairness to Mr. Lewis, he does need medical records to decide  
6 what he's willing to settle for.

7 THE COURT: Yes, I always say that parties have to be  
8 on a level playing field to be able to know -- to make the risk  
9 assessment to know what to settle for.

10 MR. LEWIS: We did have -- as the Court required, and  
11 as I think was reflected in the first letter, we did have our  
12 mandatory settlement conference, and I thought it was useful,  
13 even if it didn't result in a settlement, in terms of  
14 identifying issues and who thinks what, because that will help  
15 us to focus our efforts. And depending on how some of those  
16 issues pan out in discovery, that will help us to decide where,  
17 if we can, we can settle.

18 THE COURT: You know, Mr. Lewis, it does strike me --  
19 and I'm not going to tell you what order to do your discovery  
20 in. You're an experienced lawyer and you'll proceed the way  
21 you will. But to the extent that if you both feel that  
22 settlement talks could be more profitably undertaken when  
23 you've -- well, it may be that Mr. Lewis is the one who needs  
24 to get the information -- it may be that one of two of these  
25 medical providers you will conclude, based on the records

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1 you're seeing, are likely to be the most crucial to your  
2 arguments, and deposing those one or two sooner rather than  
3 later, not waiting to get all the medical records before you do  
4 that, might facilitate the two of you having a discussion -- a  
5 further discussion about settlement. But I'm not going to --  
6 I'm not ordering you to do that. I'm just throwing out that  
7 suggestion.

8 MR. LEWIS: I understand, Your Honor. Actually, I  
9 think that provided, among other things, that Mr. Garber's  
10 willing to stipulate that some of these medical records are  
11 business records that can be admitted, I think I may not have  
12 to take time to do that, because some of these things, I think,  
13 should be fairly --

14 THE COURT: Well, I sure hope --

15 MR. LEWIS: Oddly.

16 THE COURT: -- I sure hope that the two of you will be  
17 able to stipulate as to the admissibility. I don't know what  
18 weight any of it's going to apply to, but that you're not going  
19 to fight about authenticity or admissibility of the medical  
20 records. But we'll see.

21 I think you both have bigger fish to fry -- bigger  
22 issues to fight about than that, but we'll see.

23 Is there anything else either of you want to raise  
24 today?

25 MR. LEWIS: No, Your Honor. Thank you, again, so

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1 much, for taking us on, on such short notice. I think it's  
2 really helped.

3 THE COURT: Mr. Garber, is there anything you want to  
4 raise?

5 MR. GARBER: Thank you very much, Your Honor.

6 THE COURT: Okay, all right. Thank you both very  
7 much. All right, we're adjourned.

8 MR. GARBER: Okay. Bye-bye.

9 (Whereupon these proceedings were concluded at 2:45 PM)

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2 C E R T I F I C A T I O N

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4 I, Hana Copperman, certify that the foregoing transcript is a  
5 true and accurate record of the proceedings.

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Hana Copperman

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Date: October 8, 2014

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